Supreme Court, U. S.
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No. 77-1519

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

LANSING BOARD OF EDUCATION, a Body Corporate; and Members of the Lansing Board of Education; viz., Vernon D. Ebersole, Clare D. Harrington, Michael F. Walsh, Ray A. Hannula, Joan Hess, J. C. Williams, Bruce Angell, Joseph E. Hobrla and Max D. Shunk,

Petitioners,

vs.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Lansing Branch; Cynthia Taylor, Judith Taylor and Andrea Taylor, by Their Father and Next Friend, James R. Taylor; Melinda Lea Hedley, Christine Michele Hedley, Douglas John Hedley and Daniel Joseph Hedley, by Their Mother and Next Friend, Joan L. Hedley; Peter Miller and Elizabeth Miller, by Their Father and Next Friend, Charles Miller; Frank J. Pennoni and James Pennoni, by Their Mother and Next Friend, Kathleen Pennoni; and David Kron and Lisa Kron, by Their Father and Next Friend, Walter V. Kron,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

JOHN W. DAVIS
Attorney for Respondents
215 N. Walnut
Lansing, Michigan 48933

AMERICAN BRIEF AND RECORD COMPANY, 125 WEALTHY STREET, S.E., GRAND RAPIDS, MICHIGAN 49503 — PHONE 458-5326

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OPINIONS BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit and a memorandum in support thereof were filed on 8 February 1978. The memorandum is unreported and is set forth in the Appendix attached to the Petition for a Writ of Certiorari, as is the oral opinion of the District Court and the Order of the District Court.

In earlier proceedings the Court of Appeals for the Sixth Circuit entered judgment affirming the trial court's finding of liability. 559 F.2d 1042 (6th Cir. 1977, cert. den. ..... U.S. ....., 98 S. Ct. 635, 54 L. Ed. 2d 491 (12 December 1977). The District Court opinion from which that appeal was taken is reported at 429 F. Supp. 583 (W.D. Mich. 1976). The Court of Appeals' judgment affirming the grant of a preliminary injunction is reported at 485 F.2d 569 (6th Cir. 1973).

JURISDICTION

The judgment of the Court of Appeals was rendered on 8 February 1978. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Did the Court of Appeals disregard the substantive requirement established by this Court in *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977)?

2. May school officials and courts use the racial composition of the school system as a guide in fashioning a remedy?

STATEMENT

The Lansing School District has been determined to be de jure segregated, the courts below having found numerous substantive violations including, boundary line gerrymandering, segregative transfer policies, segregative mobile unit placements, discriminatory teacher assignments, discriminatory site selection, etc. The District Court found not only that the above mentioned discriminatory practices were many, varied, continuous and widespread but found that they had profound effect on the racial composition of the Lansing Schools.

In taking full cognizance of the effect and results, past and present, of the various discriminatory acts of the Lansing Board of Education, the Court noted that the (1) boundary line gerrymandering had the foreseeable effect of increasing the racial identifiability of Michigan Avenue School and accelerating segregation at "white Verlinden School", (2) transfer policy "was abused in a way which contributed to the segregative conditions in these (Main, Michigan and Verlinden) schools", (3) mobile unit policy had an effect on the composition of Main, Verlinden, Walnut and Barnes Schools, ". . . earmarking (them) according to their racial composition". The discriminatory effect or contemplated effect was also noted with respect to the Board rescission (1973) and the site selection on the Vivian Riddle School (opened 1976).

The remedy imposed by the District Court was a modest one in light of the breadth of said practices involving only grades one (1) through six (6), at a limited number of schools (20). In was designed by the Superintendent and the administrative staff of the Lansing School District. Cross-district busing was not involved. It was designed and implemented to correct the results of the Board's dis-

criminatory acts and the injunction prohibiting its rescission was properly held to assure that the School Board would not be permitted to *presently* resegregate those schools involved.

In formulating a plan the Lansing School District properly utilized racial composition percentages. This plan, however, approved by the District Court, is a once-only plan, and does not require that schools falling outside the 10-45% guidelines presently or subsequently, be brought into the desegregation plan.

The District Court's decision was pronounced *prior* to this Court's decision in *Dayton* v. *Brinkman,* 433 U.S. 406 (1977), and hence did not incorporate the specific wording contained therein, to wit: "incremental segregative effect". The substantive mandate of devising a remedy to cure the continuing effects of past discriminatory actions was followed.

REASONS FOR DENYING THE WRIT

1. The Court Of Appeals Correctly Followed This Court's Mandate In *Dayton Board Of Education* v. *Brinkman.*

This Court held in *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406 (1977) that the District Court must in the first instance determine whether the school board took any actions which did in fact discriminate against minority pupils. (This issue has previously been decided by the Court of Appeals with this Court denying Certiorari). Secondly, the District Court must determine how much "incremental segregative effect" these violations had on the composition of the school population. Finally, the Court must fashion a remedy to redress the difference between the present distribution of pupils as compared to

what the distribution would have been absent the constitutional violation.

In asserting that the Sixth Circuit "cavalierly" disregarded this mandate, Petitioners apparently confuse substance with literary form. To insist that in every school desegregation case, irrespective of when decided, contain specific findings labeled as "incremental segregative effects", would be to have all desegregation cases decided prior to this Court's decision in 1977, remanded for further findings. Such has not the prerogative of this Court. When faced with defining the remedial powers of district courts in fashioning desegregation plans this Court stated in *Swann* v. *Charlotte Mecklenburg Board of Education,* 402 U.S. 1 at 31 (1970):

> "In seeking to define scope of remedial powers or the limits or remedial power of courts in an area as sensitive as we deal with here, words are poor instruments to convey the sense of basic fairness inherent in equity. *Substance* (emphasis supplied), not semantics, must govern, and we have sought to suggest the nature of limitations without frustrating the appropriate scope of equity."

Substantively, the Sixth Circuit followed the mandate of this Court, to wit; assuring that the remedy imposed was directed toward the continuing effects of past discriminatory practices and tailored to cure the condition that offends the constitution. *Milliken* v. *Bradley,* 433 U.S. 267 (1977). Specifically, directing its attention to the Court's decision in *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406 (1977), the Sixth Circuit, in the instant case, held:

> ". . . we conclude that the remedy imposed was *only* (emphasis supplied), designed to redress the effect of the violations found." Pet. App. at 1a.

Such a conclusion was well founded in those factual determinations made by the trial court.

Specifically, for instance, the trial court found that the 1973 decision to resegregate the schools through rescission (involving 13 schools) required injunctive relief mandating they be continued within a desegregation plan. Additionally, the discriminatory site selection decision involving the new Vivian Riddle School opened in 1976 (in the heart of a black area) was specifically found to require inclusion of additional schools in a desegregation plan.

These specific factual findings and others, together with the trial court's determination as to their effect, distinguish this case from those cited by Petitioners.

Unlike the *Dayton* situation, the District Court circumscribed its remedy, approving a plan, non-systemwide, limited to twenty (20) elementary schools, and remedial in nature.

That this Court's rulings are "the supreme law of the land" has not been questioned in this case. Instead, such rulings have been exalted by exacting and rigorous conformity, to their *substantive* mandate.

2. "Racial Balance" In The Lansing Schools Was Neither Mandated By The District Court Nor Used As A Standard For Judicial Remedy.

Respondents strenuously assert that the District Court ruling *does not* require any particular racial balance in any school, grade, or classroom, and hence there is no conflict between this Court's ruling in *Milliken* v. *Bradley*, 418 U.S. 717 and the decision below. Petitioners apparently confuse strict adherence to set percentage enrollments and use of percentage enrollment figures as a guide in formulating relief.

We note that it is entirely appropriate to take note of the racial composition of the schools in formulating a plan

to eliminate the continuing effects of discriminatory action. *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1970).

> "From that starting point the District Court proceeded to frame a decree that was within its discretionary powers, as an equitable remedy for the particular circumstances. As we said in *Green*, a school authority's remedial plan or a District Court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations." *Swann, supra*, at 25.

Use of such enrollment figures in an attempt to eliminate the incremental segregative effect of past violations, is the only way to assure that in correcting a situation at one or more schools, we do not exacerbate the situation at other schools.

Finally, we point out that there are no provisions for including or deleting schools from the desegregation plan, based upon percentage enrollment. Such guidelines were used (by school officials when devising the plan) only as a starting or reference point. The absence of any such Court ordered mandate to keep enrollment within any set levels completely distinguishes this case from those cited by Petitioners. *Evans* v. *Buchanan*, 555 F.2d 373 (3rd Cir. 1977).

Inasmuch then, as no conflict of authority is presented here, there is no reason for this Court to further review the matter.

CONCLUSION

The Court should deny the Petition for a Writ of Certiorari.

Respectully submitted,

JOHN W. DAVIS
Attorney for Respondents
215 N. Walnut
Lansing, Michigan 48933